fare."[13] For the court says, "that the law embodies a wide spread conviction appears from the decisions in other States", and this seems to be a basis for the result reached.

RIGHT OF A CREDITOR TO SECURITIES HELD BY THE DEBTOR'S SURETY. —The doctrine that a creditor is entitled to securities given by the principal to the surety had its inception in the statement made in the early case of *Maure* v. *Harrison*[1] that "a bond creditor shall have the benefit of all counter-bonds or collateral security given by the principal to the surety." This statement, which in effect declared that the securities received by the surety are held in trust for the creditor, was accepted at an early date in New York[2] and forms the basis of the greater part of the American decisions on the subject.[3] The historical foundation of the doctrine has been destroyed, however, by the recent discovery that the statement in *Maure* v. *Harrison* was *dictum* and unnecessary to the decision of that case,[4] while many jurisdictions have recognized that on principle this doctrine is too broadly stated, since the existence of the right in a creditor should logically depend upon the purpose for which the securities are deposited.[5]

When the securities are given only for the personal indemnification of the surety, there seems on principle to be no basis on which the creditor can at any time claim a right to them.[6] The purpose of the deposit negatives the idea that it is the intention of the parties to create a trust fund for the creditor's benefit.[7] No reason is apparent, moreover, why a constructive trust should be raised in his favor. As long as both principal and surety, or either of them, is solvent, the creditor's remedy is plainly adequate at law.[8] On the other hand, if both principal and surety are insolvent, the effect of giving the creditor the benefit of the securities held by the surety is to confer on him a preference over other creditors of the principal debtor, which he did

---

[13]See Noble State Bank *v.* Haskill (1911) 219 U. S. 104, 111.

[1](1692) 1 Eq. Cas. Ab. 93.

[2]Moses *v.* Murgatroyd (N. Y. 1814) 1 Johns. Ch. 119; Vail *v.* Foster (1850) 4 N. Y. 312.

[3]See 1 Ames, Cases on Suretyship, 620 *n*; Rice *v.* Dewey (1859) 79 Mass. 47.

[4]See Sheffield Banking Co. *v.* Clayton, L. R. [1892] 1 Ch. 621; 27 Am. L. Rev. 126.

[5]Pool *v.* Doster (1881) 59 Miss. 258; Homer *v.* Savings Bank (1829) 7 Conn. 478; Sheffield Banking Co. *v.* Clayton *supra;* but see New Bedford Institution *v.* Fairhaven Bank (1864) 91 Mass. 175.

[6]The courts uniformly hold that a creditor has no right to securities given the surety for the latter's indemnity by a third party, Black *v.* Kaiser (1891) 91 Ky. 422; O'Neill *v.* State Sav. Bank (1906) 34 Mont. 521, or by a co-surety. Hampton *v.* Phipps (1883) 108 U. S. 260; Seward *v.* Huntingdon (1883) 94 N. Y. 104.

[7]Homer *v.* Savings Bank *supra;* Albany *v.* Andrews (N. Y. 1898) 29 App. Div. 20; Fertig *v.* Henne (1901) 197 Pa. 560.

[8]See Jones *v.* Quinnipiack Bank (1860) 29 Conn. 25, 40; Powles *v.* Hargreaves (1853) 3 DeG. M. & G. 430, 450. As the security was not deposited for the creditor's benefit, the view that the creditor's right arises on the insolvency of the surety alone, see 14 Am. L. Rev. 839, would seem unsound.

not contract for, and which operates to the detriment of those creditors.[9] Moreover, in order to allow the creditor to proceed directly against the debtor on the securities, it is necessary to violate the contract between principal and surety, since by the terms of the deposit with the surety, the latter gains no right to enforce the securities until he has paid the debt. Nevertheless, the English courts, which have repudiated the doctrine of *Maure* v. *Harrison* in its application to all other situations, allow the creditor to enforce the securities when both principal and surety are bankrupt[10] or their estates are being wound up in a court of chancery,[11] but in so doing they admit that the creditor has no equity on which to claim this right except that arising out of the practical difficulties of administration of the insolvent estates.[12] These difficulties would seem obviated to a large extent, however, by the method employed in the Scotch law. The creditor must prove his claim against the surety's estate, which on paying a dividend is entitled to reimbursement out of the principal debtor's estate through the securities given for this purpose, and the fund received therefrom accrues then to the benefit of all the creditors of the surety.[13] The slight difficulties which attach to administration under this method seem more than offset by the desirability of the result attained, for the contract between principal and surety is respected and no undue preference is given to any creditor.[14]

On the other hand, it would seem that a true trust fund is created when, as in the recent case of *Catskill National Bank* v. *Dumary* (N. Y. 1912) 100 N. E. 422, the security has been given to the surety not for the latter's indemnification, but for the better securing of the debt. In that case the defendant guaranteed the performance of a contract, it being contemplated that a note should be given by one of the original contracting parties in pursuance of the contract. Such a note was given, and later endorsed by the holder to the plaintiff. The latter sued both maker and endorser, who were debtor and creditor respectively on the original contract, unsuccessfully, for both were insolvent, and then sought to hold the defendant on the guaranty. As the guaranty was in terms general, it is clear that the purpose of giving it was not to indemnify the original creditor personally, but to better secure the payment of the debt to whomever should become the holder of the note. Moreover, as the original creditor's right of action on the guaranty was conditioned not on his payment of the debt, but on the non-payment of it by the principal, the court was justified in permiting the plaintiff to recover, since this did not violate the terms of the defendant's contract.[15]

---

[9]See Homer *v.* Savings Bank *supra;* dissenting opinion of Kellogg, J. in People *v.* Met. Surety Co. (N. Y. 1911) 148 App. Div. 503, 511; 1 Harv. L. Rev. 326; Royal Bank *v.* Commercial Bank (1882) L. R. 7 A. C. 366, 372 *et seq.*

[10]*Ex parte* Waring (1815) 2 Glyn & Jam. 404; s. c. 2 Rose 182; s. c. 19 Ves. Jr. 345.

[11]Powles *v.* Hargreaves *supra;* City Bank *v.* Luckie (1870) L. R. 5 Ch. App. 773; *Ex parte* Smart (1872) L. R. 8 Ch. App. 220.

[12]See Vaughan *v.* Halliday (1874) L. R. 9 Ch. App. 561, 568.

[13]Royal Bank *v.* Commercial Bank *supra; cf.* Pool *v.* Doster *supra.*

[14]1 Harv. L. Rev. 325.

[15]See 14 Am. L. Rev. 839; Ross *v.* Wilson (Miss. 1846) 7 Sm. & M. 753; Black *v.* Kaiser *supra.*